American Tool & Engineering Co., Inc. *and* Shopman's Local Union No. 726, of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO. Case 25-CA-10898, 25-CA-10716, and 25-CA-10716-2

August 6, 1981

DECISION AND ORDER

On August 27, 1980, Administrative Law Judge Elbert D. Gadsden issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

I. THE 8(A)(1) VIOLATIONS

The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their union activities;[2] threatening employees with discharge and other reprisals for engaging in union activities; instructing a supervisor to engage in surveillance of employees' union activities; creating the impression among its employees that their union activities were under surveillance; promulgating and maintaining an unlawfully broad no-solicitation, no-distribution rule; instructing employees to remove union penholders; instructing employees to cease or to refrain from distributing union literature on company property; soliciting employee grievances; and creating the impression among its employees that it would be futile for them to designate a union to represent them in collective bargaining. However, in his Decision, the Administrative Law Judge credited the testimony of certain employees concerning conversations with various management personnel but, in a number of instances, he failed to make specific findings with respect to violations alleged by the General Counsel to have occurred during these conversations. The General Counsel has excepted to the Administrative Law Judge's failure to find additional violations of Section 8(a)(1) arising out of these conversations. For the reasons set forth below, we find that Respondent violated Section 8(a)(1) of the Act on several occasions in addition to the violations found by the Administrative Law Judge.

The Administrative Law Judge found that, on separate occasions, Respondent's plant superintendent, John Scoggan, told employee Charles Johnson that Respondent could close down if a union came in and that he knew Johnson was involved in the union organizing drive. The Administrative Law Judge further found that, in a conversation with Johnson shortly after several employees were discharged, Scoggan, in response to Johnson's query as to why these employees were discharged, stated that "I told you I'd fight fire with fire." In that same conversation, Scoggan also told Johnson to "have most of the guys" take off their union penholders and that "those guys that have less than 90 days [probationary employees] won't be here." Finally, the Administrative Law Judge found that, at the time of Johnson's suspension in March, Scoggan refused to verify Johnson's version of an incident with Supervisor Robert Ashley, stating that "there's no need to bother with him because he's a union guy, too." We find that these statements constituted unlawful interrogation and threats and created the impression that employees' union activities were under surveillance, all in violation of Section 8(a)(1).

Similarly, Respondent violated Section 8(a)(1) by creating the impression that employees' union activities were under surveillance when Scoggan told employee Patrick Grush that he was aware Grush was in the Union. Respondent further violated Section 8(a)(1) when Scoggan told employee David Henline that, as a probationary employee, he had no right to "push this union."

In addition to the above findings, the Administrative Law Judge found that Respondent's president, Pinkerton, on one occasion asked employee Brad Harris how he felt about the Union, and that, on another occasion, Supervisor Wilbur (Bill) Carpenter admittedly asked employee Joel Dossen if he "had any doubts in his mind that this union would be any different from any other union." We find these questions constitute unlawful interrogation in violation of Section 8(a)(1).

Finally, the Administrative Law Judge found, and we agree, that on one occasion Supervisor Carpenter admittedly waited around the employees' break area to see which of the employees

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In adopting the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) by interrogating certain employees concerning their union activities, we do not rely on his statement that several of these interrogations were unlawful because they were "carried on by high ranking managerial officials" and "the employees were not given any assurances that they would not be subjected to acts of reprisal." The fact that employees were questioned about their union activities by admitted agents and supervisors of Respondent is sufficient to sustain a violation of Sec. 8(a)(1) with respect to these statements.

picked up union literature which had been left there. We find that such conduct constitutes unlawful surveillance in violation of Section 8(a)(1).

II. THE UNLAWFUL DISCRIMINATION

The Administrative Law Judge found that, in addition to numerous violations of Section 8(a)(1) committed by Respondent, it also violated Section 8(a)(3) and (1) by discharging employees Kim Mack, Patrick Grush, and David Henline, by suspending and later discharging employee Charles Johnson, by suspending employee James Zorger, by transferring employee Douglas Stephens to the night shift, and by denying raises to employees Zorger and Brad Harris. On the same day that the Administrative Law Judge's Decision in this proceeding was issued, the Board issued its decision in *Wright Line, a Division of Wright Line, Inc.*,[3] which set forth a two-step mode of analysis for examining causation in cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. Although the Administrative Law Judge in the instant case did not apply the precise *Wright Line* analysis, and, indeed, could not have been expected to, we find, for the reasons set forth below, that his analysis is not rendered defective by our decision in *Wright Line*.[4]

A. *February 9 Discharges*

As noted in the Administrative Law Judge's Decision, Respondent learned of the employees' union activity, which began in December 1978, sometime in late January 1979.[5] Thereafter, Respondent embarked on a campaign of widespread unfair labor practices which, as noted above, included surveillance, interrogations, and threats to discharge employees engaged in union activity, including specific threats to discharge probationary employees. In addition, on February 9, approximately 1 week after the Union filed its petition, employees Kim Mack, Patrick Grush, and David Henline were discharged. With respect to Mack, the Administrative Law Judge found that he was a probationary employee first employed by Respondent from September to early November 1978, when he was laid off for lack of work. He was recalled by Respondent on January 15. Shortly after being recalled, Mack was solicited by the Union and signed an authorization card. When Mack reported for work on February 9,[6] he was called into Scoggan's office. He was told that he was being "let go," with the cryptic explanation that "we feel as though you don't enjoy this kind of work." Several days after the discharge, when employee Charles Johnson asked Scoggan why Mack, Grush, and Henline had been discharged, Scoggan replied, "I told you I'd fight fire with fire."

At the hearing, Respondent claimed that Mack was terminated because he was unable to meet production requirements. In this regard, Scoggan inconsistently testified that, although he did not recall whether Mack's performance was satisfactory during his initial employment, Respondent had "called him back for a second chance," but his production had "stayed the same . . . it was not up to the minimum requirements."[7] Scoggan also initially denied that at the time of the discharge he had any knowledge of the union organization drive. However, when the date of the filing of the Union's petition was pointed out to him, Scoggan acknowledged that he knew of the union activity at that time, but it "had nothing to do with his [Mack's] termination."

We agree with the Administrative Law Judge that the evidence supports a finding that Mack was discharged in violation of Section 8(a)(3) and (1). Initially, we find that the General Counsel offered sufficient evidence to make out a *prima facie* case of discrimination. Respondent had shortly before threatened to discharge union adherents, particular probationary employees of which Mack was one. The discharge came within a week of the filing of the Union's petition. The explanation given to Mack was at best vague and, at worst, might be construed to imply that, as a union adherent, he must be dissatisfied in some way with his job. Furthermore, when another employee, Johnson, inquired as to the reason for the termination of Mack and others he was told, in effect, that the discharges were in response to the employees' union activity.

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[3] 251 NLRB 1083 (1980).

[4] In applying the mode of analysis first articulated in *Wright Line* to the allegedly unlawful actions taken by Respondent in this case, we do not suggest that the Administrative Law Judge might not correctly have found these discharges to be pretextual, and therefore violative of Sec. 8(a)(3) and (1) of the Act, without specific discussion of *Wright Line*. See *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Nonetheless, as we indicated in *Castle Instant Maintenance/Maid, Inc.*, 256 NLRB 130 (1981), proper application of such analysis should never alter the proper result. Our concurring colleague agrees we reach the proper result here.

We specifically reject Member Jenkins' suggestion that application of the *Wright Line* principles to this case may mislead readers into believing that the Board will attach significance to articulated reasons for discharge or discipline that are found to be pretextual in determining whether the employer would have meted out that discharge or discipline in the absence of protected conduct.

[5] All dates hereafter refer to 1979 unless otherwise specified.

[6] Although the record reveals that Mack was late for work on that day, Respondent does not allege that tardiness played any part in its decision to terminate him.

[7] Mack testified that he had some production problems shortly before his discharge but that this was due to mechanical difficulties with the machine he was operating. He further testified without contradiction that Supervisor Robert Ashley and one of Respondent's engineers had similar difficulty when they tested his machine.

In contrast, Respondent contends that Mack was terminated for poor production. Plant Superintendent Scoggan acknowledged that, as claimed by Mack, there had been mechanical problems with the machine Mack was operating at the time of his discharge and that the problem persisted after Mack was terminated. Scoggan further admitted that these difficulties affected production, although he claimed that Mack's allegedly low production was not fully attributable to the problems with his machine. In addition, Respondent offered a document comparing Mack's production on the second shift with that of an employee who ostensibly operated the same machine on the first shift and produced a substantially greater number of pieces than did Mack. Finally, Supervisor Robert Ashley testified that the quality of the parts produced by Mack was also unsatisfactory.

We are of the opinion that the foregoing evidence is not sufficient to rebut the General Counsel's *prima facie* showing that union activity was a "motivating factor" in Respondent's decision to discharge Mack inasmuch as Respondent has failed to demonstrate that its discharge of Mack would have occurred in the absence of protected conduct. In this regard, we note that there is no evidence that Respondent, prior to learning of the union organizing campaign, was in any way dissatisfied with either the quantity or quality of Mack's production. On the contrary, he was recalled by Respondent in January after being laid off several months before for lack of work, not poor production. Respondent's explanation that Mack's performance was substandard during his earlier tenure but that he was nevertheless recalled to give him a "second chance" is further belied by the contradictory testimony of Scoggan that he did not recall if Mack had any production problems before he was laid off in November 1978. Moreover, even assuming *arguendo* that Mack's work performance after his recall may have been below that of another employee performing the same function, Respondent expressed no dissatisfaction with his work until it suddenly discharged him after the commencement of union activity. In our view, Respondent has not shown a nexus between Mack's performance and its decision to terminate him. Accordingly, we conclude that Respondent would not have terminated Mack absent union activity and, therefore, the discharge violated Section 8(a)(3) and (1) of the Act.

Patrick Grush was also terminated by Respondent on February 9, allegedly for poor production and failing to properly make quality checks on parts he did produce. Grush, like Mack, had been employed by Respondent for approximately 1 month in the fall of 1978 and was then laid off. He was then recalled in early January 1979. Shortly thereafter, Grush became involved in the union organizing activity. The Administrative Law Judge credited Grush's testimony that he attended several meetings, signed an authorization card and, after a January 20 union meeting, wore a union penholder in his shirt pocket while at work. On one occasion, Supervisor Robert Ashley told Grush that wearing the penholder was not authorized and instructed him to remove it. On February 9, when Grush reported for work he was told by Supervisor Ashley to accompany him to Plant Superintendent Scoggan's office. Scoggan said, "You don't have your 90 days in do you?" and Grush replied, "No." Scoggan then said, "We're going to have to let you go" and that he regretted having to terminate Grush but that he was "in the wrong business." Scoggan told Grush he had not been making production. The Administrative Law Judge credited Grush's testimony that Scoggan also stated that he thought Grush was involved with the Union.

In addition to the above testimony, the General Counsel relied on Respondent's numerous threats, interrogations, the timing of the discharge, and Scoggan's statement to Charles Johnson that the three February 9 discharges were Respondent's method of fighting "fire with fire" to make a *prima facie* showing sufficient to support the inference that Grush's union activity was a motivating factor in Respondent's decision to discharge him. We find that the evidence is sufficient to support such an inference. In this regard, we note the substantial evidence of Respondent's union animus, as reflected by the hostility directed toward Grush and other employees, the timing of the discharge, and Respondent's virtual admission in a subsequent statement to an employee concerning the purpose of the discharge.

We find that Respondent has again failed to demonstrate that it would have terminated Grush in the absence of his engaging in union activities. Respondent contends that it terminated Grush for overall poor production and quality and in particular for failing to make required quality control checks on the parts he produced. To support the latter reason, Respondent points to an incident on or about January 30, in which Grush's supervisor allegedly found that Grush was not making required quality checks.

In addition, Scoggan testified that Grush's overall performance was substandard and that, even during his initial employment in the fall of 1978, his performance was "just barely adequate." However, Grush had been recalled to work in January and, despite the bleak performance picture painted by Respondent's witnesses, Respondent nevertheless

did not take any action against Grush until shortly after the representation petition was filed and Grush had taken actions in support of the Union. As in the case of Mack, Respondent's purported dissatisfaction with Grush, even in his initial period of employment, was suddenly discovered upon the advent of union activity at its facility and was used as an after-the-fact justification for his discharge. Moreover, even assuming that the January 30 incident concerning Grush's failure to check parts occurred, no action was taken at that time and Respondent cannot credibly rely on this incident to justify the discharge. This is especially true in light of the intervening event—the filing of the representation petition—which resulted in an intense antiunion campaign replete with multiple unfair labor practices. Accordingly, we find that Respondent has failed to rebut the General Counsel's *prima facie* case of discrimination and we conclude that Grush's discharge violated Section 8(a)(3) and (1).

The discharge of David Henline follows a similar pattern. Henline was also originally employed for approximately 3 months until laid off in November 1978. However, he was recalled the following month. The Administrative Law Judge credited Henline's testimony that he attended three union organization meetings in January, wore a union penholder in his shirt pocket, and passed out union literature at the plant. On at least one occasion, Supervisor Bill Carpenter observed him passing out literature.

On February 8, the day before his discharge, Henline was talking to a fellow employee, Steve Cornelius, about the possibility of asking management "to get off our backs because we were doing our job." At that time Carpenter approached them and told Cornelius that he was bothering Henline and should return to work. Cornelius then suggested that they all go to Scoggan's office, which they did. Henline told Carpenter that "Every time I turn around you are standing right there watching me." He suggested to Scoggan that "we agree on one thing, that you will start leaving people alone as far as this union business. We do have a right to organize." Scoggan replied that "I don't believe you've got your 90 days in,[8] and that you have a right to push this union. You're still probationary help." Henline responded that he "was legal." The following day, Henline reported late for work and was discharged. Scoggan told Henline that he was being discharged for absenteeism and because he was "not qualified."

We are of the view that the foregoing evidence constitutes a *prima facie* showing that a motivating factor in Respondent's decision to discharge Henline was his union activities. Henline was a conspicuous and vocal supporter of the Union and, the day before his termination, Scoggan implicitly threatened him with reprisal for his union activities. In addition, Respondent discharged Henline on the same day as two other union adherents whose discharges have been found violative of Section 8(a)(3) and Respondent committed numerous other unfair labor practices at about the same time. Finally, we again note the testimony of Charles Johnson, credited by the Administrative Law Judge, that Scoggan, referring to the discharges, told Johnson that he was fighting "fire with fire."

We find unpersuasive Respondent's claim that it discharged Henline for reasons other than his union activity; namely, his excessive absenteeism and poor work performance. Although Henline admitted that he had been warned sometime in January concerning absences and for "running bad parts," we find it significant that Respondent took no action against him at that time. Instead, it waited until 1 week after the representation petition was filed and 1 day after he rebuffed Plant Superintendent Scoggan's attempt to intimidate him into ceasing his union activities. In addition, as noted by the Administrative Law Judge, Henline's record had apparently improved subsequent to the January warnings. Under these circumstances, we reject Respondent's asserted legitimate reasons for the discharge of Henline and, accordingly, we agree with the Administrative Law Judge that Henline's discharge violated Section 8(a)(3) and (1) of the Act.

B. *Suspension and Discharge of Charles Johnson*

Charles Johnson began working for Respondent in May 1976. It is undisputed that Johnson became involved in union organizing activity in December 1978 and thereafter attended several organization meetings, passed out authorization cards and union literature at Respondent's facility, and served as the Union's observer at the representation election held in April. In sum, Johnson was a leading union adherent and Respondent learned of his activity in early January, when Foreman Bill Carpenter was informed of it by another employee.

In mid-January, Johnson had a conversation with Plant Superintendent Scoggan in which Scoggan told Johnson he knew Johnson was involved with the Union and "advised" him to tell his brother-in-law to remove a union penholder he was seen wearing. Scoggan also stated that Pinkerton, Respondent's president, could "close out the plant any time he wanted to and move it."

[8] Henline testified that at that time he had been employed approximately 83 days as a probationary employee.

On February 12, a few days after the discharge of employees Mack, Grush, and Henline, Johnson asked Scoggan why he had fired the employees. Scoggan replied that "I told you I'd fight fire with fire," instructed Johnson to have employees remove their union penholders, and stated that "those guys that have less than 90 days [probationary employees] won't be here."

On the morning of March 9, Johnson approached employee Douglas Stephens shortly before breaktime and asked to borrow a dollar until he could get change for a $20 bill. Foreman Robert Ashley walked up to the employees,[9] and, according to Johnson, "turned around like he was going to write somebody up." Johnson testified that at this point he told Ashley that he "wanted a copy of it because I knew there was union activity going on in the shop" and that Ashley instructed him to accompany him to Scoggan's office. In contrast, Ashley testified that he walked up and told Johnson to go back to his machine, and that Johnson became "upset" and stated that "this is not a threat; this is a promise. If I meet you outside the company property . . . ." Ashley testified that Johnson did not finish his statement. Both Johnson and Douglas Stephens, who witnessed the conversation, denied that any threat was made. The Administrative Law Judge did not make a specific finding as to whether or not Johnson actually threatened Ashley.[10]

In any event, the Administrative Law Judge found that a meeting with Scoggan ensued in which Ashley related his version of the incident. Johnson denied threatening Ashley and told Scoggan that Stephens would corroborate him. Scoggan responded that "There is no need to bother with him [Stephens] because he's a union guy, too." He then suspended Johnson for 3 days, and told him it would be up to the personnel department as to whether or not Johnson could return to work at all. Johnson subsequently returned to work after his suspension.

The Administrative Law Judge found that Johnson's suspension was discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act. In so doing, he relied on the fact that Respondent did not follow its established disciplinary procedure of giving oral and written warnings before a suspension is meted out and that Respondent was not interested in ascertaining the truth with respect to the alleged threat, as evidenced by Scoggan's refusal to question Johnson's witness, Douglas Stephens. The Administrative Law Judge also noted Scoggan's reference to Stephens as "a union guy, too."

The evidence fully supports a finding that the General Counsel made a *prima facie* showing sufficient to support the inference that Johnson's union activities were a motivating factor in Respondent's decision to discipline him. Our conclusion is based on several factors. First, there is ample evidence of Respondent's union animus, as reflected by its numerous threats and other unfair labor practices, which included threats against Johnson personally. In addition, we find that Respondent's summary handling of the incident, along with Scoggan's direct reference to Stephens as "a union guy, too," reflected Respondent's preoccupation with the union activity and its intention to carry out the previously stated intention to punish those employees engaged in union activity.

In defense of Respondent's action, Foreman Ashley and Superintendent Scoggan both testified that Johnson admitted to threatening Ashley and apologized. However, Respondent offered no evidence as to why it suspended Johnson rather than issue him a warning for a first offense, which was the customary practice. Thus, even assuming that Johnson uttered an implied threat to Ashley, Respondent has presented no convincing explanation for its deviation from the disciplinary procedure utilized prior to the Union's appearance on the scene. Accordingly, we conclude that Respondent violated Section 8(a)(3) and (1) by suspending Johnson.

Johnson returned to work after his suspension and apparently worked without incident for approximately 1 month. He testified that he needed some dental treatment as a result of a work-related injury and Respondent notified him in early April that for insurance purposes it was essential that he complete his treatments in the near future. Johnson testified that he made an appointment to have several teeth extracted after work on Friday, April 20. He further testified that he informed Foreman Ashley and Albert McMaken, Respondent's personnel director, that he was going to the dentist on Friday and that he would not be at work on Monday, April 23, because he did not feel he would be able to return to work until Tuesday. Johnson testified that the dentist, a Dr. Parnell, was not in when he went to his office on Friday and that he was told to return on Monday, April 23, which he did. According to Johnson, when he arrived at Dr. Parnell's office on Monday "they put me off until Tuesday." When he returned home from the dentist's office on Monday, he received a telegram notifying him that he had been terminated.

[9] Johnson testified that he did not recall what Ashley initially said.

[10] For the reasons stated in the Administrative Law Judge's Decision and our decision herein, we find it unnecessary to make a credibility determination in this regard.

Personnel Manager McMaken testified that Respondent's policy requires employees who will be absent from work to call in within 2 hours after the beginning of their shift and that Johnson's shift began at 7 a.m. He testified that about 9 a.m. on Monday, April 23, Scoggan called him on the intercom and asked if he had received any notification from Johnson that he would be absent that morning. McMaken told Scoggan he had not.[11] Shortly thereafter, McMaken met with Scoggan and Goff. According to McMaken, they discussed Johnson's "long history of absenteeism and tardiness and not calling in," that he was now "AWOL," and that he had been through "the prior steps and we are at a termination point." McMaken stated that they decided to call Lloyd Peterson, their counsel, who told them if they had a case they could terminate Johnson. McMaken then prepared and sent a telegram notifying Johnson of his termination for "excessive absenteeism and failure to call in and AWOL."

Superintendent Scoggan testified that employees who are "AWOL" 3 consecutive days are automatically terminated. He further testified that, on Monday, Supervisor Ashley came into his office, told him that he had not heard from Johnson, and asked if Scoggan had. Scoggan replied that he had not and they called McMaken. Scoggan further testified that, since Johnson was "AWOL" after having already received a 3-day suspension for threatening a foreman, it was decided "the next move was termination." Scoggan testified that he then instructed the personnel department to send Johnson a telegram.

Supervisor Ashley testified that at no time prior to April 23 did Johnson inform him that he had an appointment with a dentist. Respondent called Barbara Craig, an employee at Dr. Parnell's office. Craig testified that Dr. Parnell did not work on Mondays and that Johnson did not have a listed appointment either for Friday, April 20, or Monday, April 23.[12] She further testified that she did not recall whether Johnson came in on Friday, April 20, and did not know if he came in on Monday, April 23, since she does not work on Mondays. Finally, Craig testified that on occasion a patient will call for an appointment and Dr. Parnell will try to fit him into his schedule. If he subsequently cannot do so, that patient's name will not appear anywhere in the appointment book.

We agree with the Administrative Law Judge's conclusion that Respondent's discharge of Johnson violated Section 8(a)(3) and (1). In this regard, we rely on the evidence of Respondent's union animus, its unlawful conduct directed against Johnson, including the suspension in March, and Respondent's deviation in Johnson's case from its stated policy of discharging employees after they are absent 3 consecutive days without calling in. We also rely on the precipitous manner in which Respondent discharged him, as reflected in the extraordinary act of sending a Western Union telegram within an hour of its "discovery" that Johnson was absent.[13]

The evidence offered by Respondent to rebut the General Counsel's case contains a substantial inconsistency. In an attempt to explain why Johnson was immediately discharged for failing to call in by 9 a.m. on Monday, Superintendent Scoggan and Personnel Manager McMaken asserted different justifications for Johnson's discharge. As noted above, Scoggan asserted that, since Johnson had been suspended 1 month before, "the next offense that serious is discharge." He testified that he considered being "AWOL" shortly after a suspension for threatening a supervisor to be "ample justification" for discharge. McMaken, on the other hand, testified that it was decided that Johnson would be terminated for excessive absenteeism and failure to call in. In our view, the inconsistent explanation offered by Respondent for its deviation in Johnson's case from its established policy of discharge after three consecutive "AWOL" absences, as reflected in its assertion of conflicting justifications for Johnson's discharge, calls into question its motivation. In addition, to the extent that the discharge was based upon Johnson's prior suspension, as claimed by Scoggan, it was unlawful, since we have found the suspension violated Section 8(a)(3) and (1). Respondent cannot rely on its prior unlawful conduct to justify a subsequent action taken against an employee. Under these circumstances, we must conclude Respondent's discharge of Johnson violated Section 8(a)(3) and (1).

II. ADDITIONAL VIOLATIONS

The Administrative Law Judge found that Respondent also violated Section 8(a)(3) and (1) by refusing to grant wage increases to employees James Zorger and Brad Harris, by suspending Zorger, and by transferring employee Douglas Stephens to the second (night) shift.

With respect to Harris, the record reveals that he began working for Respondent in July 1978. Approximately 3 or 4 months later, he began working as a "surface grinder." Harris testified that em-

[11] McMaken denied that Johnson told him at anytime that he was going to the dentist either on Friday, April 20, or Monday, April 23.

[12] A copy of Dr. Parnell's appointment listing for these days was introduced by Respondent.

[13] Personnel Manager McMaken's testimony that Respondent "quite often" sent telegrams of this type to employees is unpersuasive. Indeed, Plant Superintendent Scoggan contradicted McMaken. When asked if this is the normal procedure, he responded, "In this case it is, yes."

ployees ordinarily received raises within 60 to 90 days after beginning a new job and that, when he asked President Pinkerton in early February about such a raise, Pinkerton said he would "check it out." However, in the same conversation Pinkerton interrogated Harris concerning his union sympathies and told him that supporting the Union was like calling Pinkerton a "son of a bitch."[14] In a subsequent discussion, Plant Superintendent Scoggan told Harris to see his new foreman, Burt Baeurle, and "go through him for a raise. . . ."[15] Harris testified without contradiction that when he approached Baeurle, he was told that he would receive no wage increase "because of the union petition and union activities coming in that they couldn't issue any raises." Respondent offered the testimony of several witnesses who denied that such raises were customary. However, the Administrative Law Judge credited Harris' testimony that they were. With respect to Zorger, the parties stipulated that he was denied a promised raise because of the filing of the representation petition.

In Harris' case, we agree with the Administrative Law Judge's finding that Respondent violated Section 8(a)(3) and (1) by denying him a wage increase. The General Counsel's evidence concerning Respondent's union animus, as reflected by its numerous unfair labor practices directed against its employees, including Harris, and the fact that Respondent ordinarily gave raises within 60 to 90 days to employees similarly situated is sufficient in our view to show that union activity was a motivating factor in Respondent's decision. In addition, we note Harris' uncontradicted testimony that Foreman Baeurle told him that no raises were being given because of the representation petition. In contrast, the testimony of Respondent's witnesses that such raises were not customary was properly discredited by the Administrative Law Judge and, therefore, insufficient to rebut the General Counsel's case. Accordingly, we find that the evidence fully supports the conclusion that Respondent unlawfully denied a wage increase to Harris in violation of the Act.

With respect to Zorger, as noted above the parties stipulated that he was denied a raise because of the petition. Since Respondent's conduct was admittedly prompted by the Union's presence, its conduct violated Section 8(a)(1) of the Act.[16] Accordingly, Zorger, like Harris, is entitled to receive the wage increase and be made whole for any loss of earnings caused by the denial.[17]

The Administrative Law Judge further found that Respondent unlawfully suspended Zorger for 3 days in July in violation of Section 8(a)(3) and (1). In addition to the evidence concerning Respondent's union animus, including the unfair labor practices directed against Zorger, noted above, Zorger credibly testified that, although he had indeed been guilty of "running bad parts" as alleged by Respondent, he was the first employee suspended for such conduct. Zorger further testified without contradiction that several other employees had on occasion been guilty of the same "offense" and were not disciplined. Thus, the General Counsel's showing of union animus and disparate treatment was sufficient to support the inference that union activity was a motivating factor in Respondent's decision to suspend Zorger and Respondent has failed to rebut this *prima facie* case of unlawful motivation. Accordingly, we agree with the Administrative Law Judge that Zorger's suspension violated Section 8(a)(3) and (1) of the Act.

Finally, the Administrative Law Judge found that the transfer of employee Douglas Stephens to the second (night) shift violated Section 8(a)(3) and (1) of the Act. He found that in January Stephens attended a union organizing meeting and thereafter passed out authorization cards. In late January or early February, Stephens was approached by Superintendent Scoggan, who said that he had heard "through the grapevine" that Charles Johnson, Stephens, and another employee were trying to organize a union. Shortly thereafter, Stephens was transferred to the second (night) shift, ostensibly because an inspector was needed on that shift. However, approximately 2 weeks later Stephens was called into Scoggan's office. At that time, Scoggans said that Respondent was doing away with second-shift inspection and told Stephens, "I am tired of taking your shit." Stephens was then transferred back to the day shift, but as a machine operator.

Respondent offered testimony that, as noted above, it needed an inspector on the second shift

[14] Harris was also interrogated by Foreman Francis Miller concerning his feelings about the Union.

[15] Although Baeurle's supervisory status is not free from doubt, the record reveals that Baeurle's predecessor as Harris' foremen, Francis Miller, is an admitted supervisor, as are the other individuals classified as foremen by Respondent. Accordingly, we believe the evidence is sufficient to support a finding that Baeurle is a supervisor within the meaning of Sec. 2(11). In any event, even if Baeurle is not a supervisor, he was acting as Respondent's designated agent at least with respect to the issue of Harris' raise and had authority to speak for Respondent in this regard.

[16] See, e.g., *World Wide Press, Inc.*, 242 NLRB 346 (1979); *Travis Meat & Seafood Company*, 237 NLRB 213 (1978); *The May Department Stores Company d/b/a Famous-Barr Company*, 174 NLRB 170 (1969). Respondent does not contend that its denial of a wage increase to Zorger was accompanied by any assurances that the increase would be granted after the representation issue was resolved. See, e.g., *Cutter Laboratories, Inc.*, 221 NLRB 161 (1975).

[17] See, e.g., *World Wide Press, supra*. We find it unnecessary to consider whether the denial of the wage increase also violated Sec. 8(a)(3) as found by the Administrative Law Judge since it does not affect the remedy. See *Drawo Lime Company*, 234 NLRB 213 (1978).

because of quality problems but shortly thereafter decided that it was more economical to have Supervisor Bill Carpenter handle inspection on the night shift. As to why Stephens was transferred from inspector to production, Plant Manager William Goff testified that there were no openings for a day-shift inspector. However, Superintendent Scoggan testified that Stephens requested that Scoggan get him "back into manufacturing" if he could not have a raise in the inspector's job.

We agree with the Administrative Law Judge's conclusion that Stephens' transfer to the second shift violated Section 8(a)(3) and (1) and that his transfer from the inspector's position to production also violated the Act. In particular, we rely on the evidence concerning Respondent's union animus and contemporaneous unfair labor practices, the interrogation of Stephens concerning his union activity in concert with other first-shift employees, and the timing of the transfers, including the almost immediate transfer back to the first shift. In contrast, Respondent's evidence concerning allegedly valid reasons for the transfers is unconvincing. In this regard, we note that Respondent's ostensible need for a second-shift inspector was suspiciously short-lived. We also note that Respondent's witnesses Goff and Scoggan contradicted each other as to the reason for Stephens' transfer from inspection to production, the former attributing the change to lack of a position,[18] the latter claiming that Stephens requested the change. Accordingly, we find that Respondent has failed to meet its burden of showing that Stephens would have been transferred absent his union activities.[19]

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) and (3) of the Act, we shall order that Respondent cease and desist therefrom and take appropriate affirmative action set forth below to effectuate the policies of the Act.

1. Having found that Respondent promulgated and maintained an unlawfully broad no-solicitation, no-distribution rule in violation of Section 8(a)(1), we shall order that Respondent rescind and revoke said rule.

2. Having found that Respondent violated Section 8(a)(3) and (1) by discharging employees Kim Mack, Patrick Grush, David Henline, and Charles Johnson because they engaged in union activity, we shall order that Respondent offer them reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent ones without prejudice to seniority or other rights and privileges previously enjoyed by them. We shall additionally order that Respondent make these employees whole for any loss of earnings suffered by reason of the action against them, by payment to them of a sum of money equal to what they would have earned absent the unlawful conduct, less net earnings, if any, during such period, in accordance with *F. W. Woolworth Company*,[20] with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*.[21]

3. Having found that Respondent violated Section 8(a)(3) and (1) by suspending employees James Zorger and Charles Johnson because of their union activity, we shall order that Respondent rescind and revoke said suspensions and expunge from its records any memoranda of or reference thereto. We shall additionally order that Respondent make these employees whole for any loss of earnings suffered by reason of this unlawful conduct in the manner set forth above.

4. Having found that Respondent violated Section 8(a)(1) by failing and refusing to grant a wage increase to employee James Zorger and violated Section 8(a)(3) and (1) by refusing a wage increase to employee Brad Harris, we shall order that Respondent grant such wage increases. We shall additionally order that Respondent make Zorger and Harris whole for any loss of earnings suffered by reason of this unlawful conduct[22] in the manner set forth above.

5. Having found that Respondent violated Section 8(a)(3) and (1) by transferring employee Douglas Stephens to its night shift and later back to the day shift as a production employee because of his union activity, we shall order that Respondent, upon request, reinstate him to his former position as an inspector and make him whole for any loss of earnings suffered by reason of the discrimination against him in the manner set forth above.

[18] Of course, even if Goff's testimony were credited, Respondent created this situation by transferring Stephens to the night shift in the first instance.

[19] Although the Administrative Law Judge found that Stephens' transfers violated Sec. 8(a)(3) and (1), his recommended Order does not provide for reinstatement of Stephens to his former position as an inspector. Since we find that Stephens' transfer to production was caused by Respondent's unlawful conduct, we shall provide the appropriate reinstatement language in our Order.

[20] 90 NLRB 289 (1950).

[21] 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[22] Since we agree with the Administrative Law Judge's conclusion that Harris was denied a raise in violation of Sec. 8(a)(3) and (1), we find that he would have received a raise at least 90 days after he began working as a grinder. However, since the record is unclear as to the exact date that Harris attained that classification, we shall leave to compliance the determination of the exact date the raise would have been granted absent the union activity.

With respect to Zorger, Respondent admits that he was denied a raise because of the union petition. We shall leave to compliance the determination of the exact date such a raise would have been granted absent Respondent's unlawful conduct.

Finally, we conclude that Respondent's numerous and serious unfair labor practices clearly "demonstrate a general disregard for the employees' fundamental statutory rights."[23] Accordingly, we agree with the Administrative Law Judge that a broad order is warranted in this case and we shall so provide.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, American Tool & Engineering Co., Inc., Ft. Wayne, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their union activities, interests, and desires and the activities of other employees.

(b) Threatening employees with discharge or other reprisals for engaging in union activities.

(c) Instructing its supervisors to engage in surveillance of employees' union activities.

(d) Creating the impression among its employees that their union activities are under surveillance.

(e) Engaging in surveillance of employees' union activities.

(f) Instructing employees to remove union penholders or other union insignia.

(g) Instructing employees to cease or to refrain from distributing union literature on company property.

(h) Promulgating and maintaining an unlawfully broad no-solicitation, no-distribution rule.

(i) Soliciting employee grievances.

(j) Creating the impression among its employees that it would be futile for them to designate a union to represent them in collective bargaining.

(k) Failing to grant promised wage increases during the pendency of a representation petition.

(l) Discriminatorily assigning employees to more onerous and inconvenient duties or work shifts because they engaged in union activities.

(m) Discriminatorily failing and refusing to grant wage increases to employees because they engaged in union activities.

(n) Discriminatorily suspending or terminating the employment of employees because they engaged in union activities.

(o) In any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to Kim Mack, Patrick Grush, David Henline, and Charles Johnson reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights previously enjoyed, and make them whole for any loss of pay suffered by reason of the discrimination against them, with interest, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Pay to James Zorger and Brad Harris the increase in wages they would have received absent the discrimination against them, and make them whole for any loss of pay suffered by reason of the discrimination against them, with interest, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Make Charles Johnson and James Zorger whole for any loss of pay suffered by reason of their discriminatory suspensions, with interest, in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Rescind and revoke the suspensions given to Charles Johnson and James Zorger and expunge from its records all memorandums of or references thereto.

(e) Rescind and revoke its no-solicitation, no-distribution rule.

(f) Upon request, reinstate Douglas Stephens to his former position as an inspector on the day shift or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights previously enjoyed, and make him whole for any loss of pay suffered by reason of the discrimination against him, with interest, in the manner set forth in the section of this Decision entitled "The Remedy."

(g) Post at Respondent's place of business in Ft. Wayne, Indiana, copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[23] *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

MEMBER JENKINS, concurring:

I agree with the result reached by my colleagues, but not the time and ink they have spent logging the route in applying *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), to a "pretext" case.

Wright Line is a method of determining a case in which more than one true (not specious or pretextual) reason—one or more unlawful reasons and one or more lawful—played a part in a discharge.

Only one of the five discharges involves a possible dual or mixed motive, that of Henline. The other four, Mack, Grush, Johnson, and Zorger, are plainly pretext cases and so found by the Administrative Law Judge, albeit in awkward and turgid fashion. To apply a *Wright Line* analysis to these cases is redundant, and leads to the conclusion that every pretextual reason warrants a *Wright Line* evaluation—which is erroneous.

Henline's case is slightly, but not much, different—principally because the Administrative Law Judge used "substantially, if not totally, motivated" language in his case (ALJ sec. III,B). Yet, in the next paragraph he applies a routine pretext analysis and finds the discharge "predicated upon a discriminatory motive." He also uses the same analysis in the paragraph immediately preceding the "substantially . . ." phrase, and his discussion which follows is also directed at the pretextual quality of Respondent's defenses.

Use of *Wright Line* analysis in "pretext" cases adds nothing except hollow words, and may confuse the readers into thinking that pretextual reasons are entitled to some weight, that specific proof of motive is required where it is not, or similar errors. Indeed, some of these arguments are already being advanced. Thus, I do not subscribe to the course followed here by my colleagues.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT interrogate our employees concerning their union activities, interests, and desires and the activities of other employees.

WE WILL NOT threaten employees with discharge or other reprisals for engaging in union activities.

WE WILL NOT instruct our supervisors to engage in surveillance of employees' union activities.

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT engage in surveillance of our employees' union activities.

WE WILL NOT instruct our employees to remove union penholders or other union insignia.

WE WILL NOT instruct our employees to cease or to refrain from distributing union literature on company property.

WE WILL NOT promulgate and maintain an unlawfully broad no-solicitation, no-distribution rule.

WE WILL NOT solicit employee grievances.

WE WILL NOT create the impression among our employees that it would be futile for them to designate a union to represent them in collective bargaining.

WE WILL NOT refuse to grant promised wage increases during the pendency of a representation petition.

WE WILL NOT discriminatorily assign employees to more onerous and inconvenient duties or work shifts because they engaged in union activities.

WE WILL NOT discriminatorily fail and refuse to grant wage increases to employees because they engaged in union activities.

WE WILL NOT discriminatorily suspend or terminate the employment of employees because they engaged in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL offer to Kim Mack, Patrick Grush, David Henline, and Charles Johnson reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered by reason of the discrimination against them, with interest.

WE WILL pay to James Zorger and Brad Harris the increase in wages they would have received absent the discrimination against them, and make them whole for any loss of pay suffered by reason of the discrimination against them, with interest.

WE WILL make Charles Johnson and James Zorger whole for any loss of pay suffered by reason of their discriminatory suspensions, with interest.

WE WILL rescind and revoke the suspensions given to Charles Johnson and James Zorger and expunge from our records any memorandums of or references thereto.

WE WILL rescind and revoke our no-solicitation, no-distribution rule.

WE WILL, upon request, reinstate Douglas Stephens to his former position as an inspector on the first shift or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights previously enjoyed, and make him whole for any loss of pay suffered by reason of the discrimination against him, with interest.

AMERICAN TOOL & ENGINEERING CO., INC.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge: Upon original unfair labor practice charges filed in Case 25-CA-10716 on March 7, 1979, Case 25-CA-10716-2 on April 16, 1979, and Case 25-CA-10898 on May 4, 1979, respectively, by Shopman's Local Union No. 726, of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, herein called the Union, against American Tool & Engineering Co., Inc., herein called Respondent, amended complaints were issued by the Regional Director for Region 25 on behalf of the General Counsel, in Cases 25-CA-10716 and 25-CA-10716-2 on April 17, 1979, and in Case 25-CA-10898 on June 13, 1979, respectively. Said cases were consolidated for hearing in an order of the Regional Director for Region 25 on July 20, 1979.

In substance the complaints, as amended, allege that, between September 1978 and April 1979, Respondent through its managerial staff coerced and restrained employees on numerous occasions, in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act; and that it discriminated against several of its employees by ceasing to provide employees with cotton work gloves, refusing to grant scheduled and promised wage increases, and suspending, discharging, failing, and/or refusing to reinstate said employees, all because said employees joined or gave assistance to the Union, or engaged in other concerted activities, in violation of Section 8(a)(3) of the Act; and because an employee gave testimony under the Act, in violation of Section 8(a)(4) of the Act.

Respondent timely filed answers denying the allegations set forth in the complaints.

The hearing in the above-consolidated matter was held before me in Fort Wayne, Indiana, on August 15 and September 17, 18, 19, and 20, 1979. Briefs have been received from counsel for the General Counsel and counsel for Respondent, respectively, which have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is now and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Indiana. At all times material herein, Respondent has maintained its principal office and place of business at Fort Wayne, Indiana, herein called the facility, where it is engaged in the sale and distribution of machine castings and related products.

During the past year, a representative period, Respondent, in the course and conduct of its business operations, sold and distributed at its facility products valued in excess of $50,000 which were shipped from said facility directly to States other than the State of Indiana. Also during the past 12 months, which period is representative, Respondent, in the course and conduct of its business operations, purchased, transferred, and delivered to the facility goods and material valued in excess of $50,000 which were transported to said facility directly from States other than the State of Indiana.

The complaint alleges, the parties stipulated, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the parties stipulated, and I find that Shopman's Local Union No. 726, of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, herein called the Union, is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Respondent, an Indiana corporation, maintains its principal office and business facility at Fort Wayne, Indiana, where it produces machine castings and machine parts for the automobile industry as well as other industries. It has about 60 employees distributed over three work shifts.

The parties herein stipulated that, at all times material herein, the following named persons occupied positions set opposite their respective names, and have been and are now agents of Respondent at the facility, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act: John F. Scoggan, plant superintendent; William Goff, plant manager; Dwight Pinkerton, president; Albert McMaken, director of purchasing and personnel; Wilbur Carpenter, foreman; Robert Ashley, foreman; Francis Miller, foreman; and Steve Morr, foreman.

The parties further stipulated that on or about November 17, 1977, the Respondent promulgated and has since then maintained an overly broad no-solicitation rule within the meaning of *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793 (1945), as follows:

> Employees must not solicit or distribute any written or printed material to other employees in production or work areas during scheduled hours of work.

Respondent has work rules and a disciplinary procedure outlined in its pamphlet entitled "Employment Policies" for employees which provide in pertinent part that:

> 1. The probationary period of employment is 90 days, during which new employees may be terminated at anytime for unsatisfactory progress and work performance. Such employee *must* work the 60 day minimum of the 90-day period.
>
> 2. *Tardiness.* An employee should call in and give his name, department, and the name of his supervisor.
>
> 3. *Absences.* An employee should notify his supervisor in advance or within two hours after the start of the shift, and give his name, department and name of his supervisor.
>
> The disciplinary procedure for violating work rules is as follows:
>
> 1. Oral warning
> 2. Written warning
> 3. Suspension
> 4. Involuntary termination

The oral warning is given by the immediate supervisor with a notation of said warning inserted into the employee's personnel record. The written warning is presented to the employee by the employee's supervisor, explaining the violation and what action the Company will take on any further violation of company policy. When an employee is suspended, he is suspended without pay for up to three working days or termination. The violation of work rules need not be the same rule in order to receive the next highest penalty.

With respect to new employees, a new employee may work 35–40 days, 60–75, or even 80 days before Respondent makes a decision as to whether he is to continue in its employ.

With respect to absences, an employee may have two or three absences a month before he is given an oral warning. However, all employees should call within the first 2 hours of the start of the work shift. If absenteeism is excessive, Respondent may require the employee to bring a doctor's excuse. An employee is late if he reports to work any time after 7 o'clock. If the employee does not call in by 9 o'clock he is considered AWOL. An automatic termination results after 3 days' absence without calling in. Respondent generally terminates an employee on a Friday, rather than during the workweek. The notice of discharge is generally given in person or by letter.

Respondent had a shop committee composed of rotating members (employees) to resolve labor problems with managment. The members of the committee were elected by the employees and the committee operated until February 2, 1979,[1] when Respondent received a letter from the National Labor Relations Board.[2]

B. *The Union Activity of Employees and Respondent's Knowledge Thereof and Reactions Thereto*

Employee *Charles (Charlie) Johnson* was employed by Respondent in May 1976 and has worked in several departments of the plant. Johnson undisputedly testified that he became involved in union activities in December 1978. In January 1979, he and other employees distributed union literature on the Company's parking lot. Thereafter he had a conversation with Plant Superintendent John Scoggan about the Union, during which Scoggan said, "We will fight fire with fire." Johnson said he asked Scoggan what he meant by the latter statement and Scoggan said, "Well, you have a brother-in-law that works on the second shift and he is wearing . . . well he is participating in union activity and has a union penholder in his pocket, a penholder; I would advise you to have him take it out." Johnson said his brother-in-law is Roger Boggs. He said Scoggan also said that Pinkerton could close out the plant and move it any time he wanted to.

Johnson also served on the shop committee (composed of employees and management representatives) until it was suspended by Respondent in February 1979, after it received the petition from the National Labor Relations Board. At that time, Johnson said Scoggan told him he (Scoggan) knew he (Johnson) was participating in the Union and Johnson said he replied, "Yes, it's probable." On examination Scoggan denied that he made the interim remark.[3]

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[1] All dates herein refer to the year 1979 unless specifically specified otherwise.

[2] The above facts are not disputed and are not in conflict in the record.

[3] I credit Johnson's testimony and discredit Scoggan's denial thereof, not only because I was persuaded by their conduct on the stand that

Continued

Francis Miller, a foreman, was employed by Respondent in December 1977 until April 1979. He was a foreman in the grinding section and testified that *he first learned that there was a union drive in the plant in late January 1979. Thereupon, he told Plant Superintendent John Scoggan and Foreman Wilbur (Bill) Carpenter that he had heard rumors of union activities. Scoggan told him to keep his ears open and see if he could hear any more.* In March, Miller said he gave his statement to the National Labor Relations Board, after which Scoggan asked him what did he tell the National Labor Relations Board. Miller said he gave Scoggan a copy of his statement given to the Board and *Scoggan told him he (Miller) made him (Scoggan) a liar by telling the National Labor Relations Board that he (Scoggan) knew of the union activities in January.*

Foreman Wilber Carpenter undisputedly testified to a conversation he had with 60-year old employee Charles Austin, as follows:

> THE WITNESS: It happened in early January on a Sunday. I was sitting at home watching a football game and the telephone rang and it was Mr. Austin. And he asked me "What the hell's going on?" And I said, "What are you talking about?" And he said, "I just had four guys over here trying to get me to sign a union card." And he said, "I thought you ought to know about it if you don't know." And I said, you know, "I don't know anything about it," And he said, "Well, *Charlie Johnson* and *Charlie Newton, Steve Cornelius,* and *Doug Stephens* came over to his house and tried to talk him into signing a union card. And he said, "Bill, I don't want nothing to do with that." He said, "I don't know what the hell they're trying to prove." And he said, "They told me that they were going to have a meeting some place at sometime." And I asked him, and I said, "*Charlie, are you going to the meeting?*" And this was not in a serious manner, it was in a joking manner. [Emphasis supplied.]
>
> Q. (By Mr. Sherr) Would you continue with the conversation?
>
> A. Okay. I asked him if he was going to the union meeting and he said "no." And he said all he wanted to do was just to inform me of what was going on so that I would know.

Credibility

Considerable questions of credibility are raised by the testimonial versions of employees verses managerial personnel of Respondent. Additionally, the record contains a great deal of detail described by the several witnesses with respect to each of the conversations held between employees and management. Except for the testimony of Foreman Francis Miller, whom I credited, most of the testimony by management officials, Superintendent John Scoggan, President Dwight Pinkerton, and Foremen Robert Ashley and Wilber Carpenter consisted of denials to statements or questions attributed to them by employees. Essentially, however, I have discredited their (managements') numerous denials and most of their affirmative testimony because not only was I persuaded by their demeanor that they were not testifying truthfully, but the considerable circumstantial evidence of record reinforces my resolutions. Conversely, while I was not persuaded by every aspect of the employees' demeanor for truthfulness, I was substantially persuaded by their demeanor and the circumstantial facts, that their testimony was truthful to the extent that it is consistent with my findings. Other factors considered in resolving credibility are explained under analysis and conclusion herein.

Analysis and Conclusion

A determination of the validity of the allegations with which Respondent is charged and the corresponding defenses asserted by it in response thereto depend largely upon a determination of the veracity of the several witnesses whose testimony is highly conflicting. While it is difficult in some instances to resolve such vexing questions of fact to which the parties alone bear witness, I have considered the relationship of each witness to the party on whose behalf he testified, the readily responsive, nonselective, nonexaggerating, consistent, and straightforward manner in which he testified, the reasonableness of efforts made by the parties to bring essential witnesses and appropriate documentary evidence before the court, as well as how such testimony or other evidence relates to the logical consistency of all the evidence of record and the sequence of events as they transpired.

It is established by stipulation of the parties, and I so find, that Respondent promulgated and maintained an overly broad no-solicitation/no-distribution rule in violation of Section 8(a)(1) of the Act.

The undisputed and credited evidence of record shows that Charles (Charlie) Johnson became involved with the Union in December 1978; that in mid- or late January 1979, employees Charlie Johnson, Douglas (Doug) Stephens, Joel Dossen, Patric (Pat) Grush, David Henline, and Charles Newton attended a union organizing meeting on January 20; that on January 21 and thereafter employees Charlie Johnson, Pat Grush, David Henline, and Charles Newton wore union penholders into the plant; and that Charlie Johnson, Doug Stephens, and Joel Dossen distributed union literature on the plant's parking lot.

The credited evidence of record further shows that Foreman Francis Miller acknowledged that he learned about the employees' union activity in late January and thereupon informed Plant Superintendent John Scoggan and Foreman Wilbur (Bill) Carpenter of such fact. Foreman Carpenter acknowledged he learned about the employees' organizing or union activities during a telephone call from employee Charlie Austin in early January 1979, during which Austin advised him that employees Charlie Johnson, Charles Newton, Steve Cornelius, and Doug Stephens were involved in the organizing effort. Consequently, I hereupon conclude and find that Respondent, through its managerial staff (Miller, Scoggan, and Car-

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Johnson was truthful and Scoggan was not, but also because Johnson's account is consistent with the testimonial accounts of other employee witnesses, *infra*, with respect to Respondent's antiunion conduct.

penter), had knowledge of the employees' union activities in mid-January 1979.

The undisputed testimony of employee Pat Grush and Foreman Robert Ashley shows that, on January 30, Grush did not check his parts with the gauge as he was required to do, and that Foreman Ashley verbally warned him about not doing so every 10 parts. He was told Respondent could not tolerate unchecked parts and Grush promised he would thereafter check his parts as directed and make his production.

Perhaps the only significant discrepancy in the testimonial versions of Grush and Ashley is the date of the incident. Grush testified the incident occurred on January 30 and Ashley testified it occurred in January. In either event however, the record does not show that at that time Grush was terminated or warned about termination in the future. Grush continued to testify as follows:

> Q. All right. February 9th, the last day that you worked. What happened on that day?
>
> A. As I went in to work, I clocked in. Mr. Pinkerton asked me how my job was and how I was doing and I said, "Fine." And he walked away, and I went to my job. At approximately 3:30 on the 9th of February, Bob Ashley come to me and said, "Don't start work yet." And I walked over by the time clock and he said, "Follow me to John's office." So I did. And we walked in and he closed the door.
>
> Q. You asked for a witness?
>
> A. Yes.
>
> Q. What did they tell you?
>
> A. No.

Grush further testified that Scoggan said, "You don't have 90 days in do you?" and he said "No." Scoggan then said, "[W]e're going to have to let you go . . . . It is with deepest regrets to terminate you," but "you're in the wrong business, you're not making production." He told Scoggan he was making it on operation 10 but Scoggan told him that he (Grush) was involved in union activity and asked him did he have anything to do with the Union. Grush said he did not respond. Superintendent Scoggan denied that he made any such comments or inquiries about the Union.

Employee *Kim Mack* testified that he was first employed by Respondent from September 26, 1978, to early November 1978, when he was laid off for lack of parts from another company. He was recalled by Respondent on January 15, 1979, and worked on the right angle line where he made production nearly every day. He was subsequently put on sandblasting where he did not make production easily. On or about January 25, Foreman Bob Ashley told him he would have to get out at least 200 parts that day. He further testified that in early February his parts were not coming out right (for shape and finish) and the corresponding employee on the prior shift, Rick Jones, was having the same problem. The Company knew about the machine problem and sent one of its engineers to repair it. Mack said he observed the engineer running parts and that he was running some good parts and some defective ones.

On February 9, Mack said he reported to work 1 hour late and punched in. Foreman Ashley told him to come with him to the office. Mack continued to testify as follows:

> And when I went into the office, John said something to the effect of, "how're you doing?" And then he said, "I am afraid I am going to have to let you go." He said, "We feel as though you don't enjoy this kind of work." And he handed me my paycheck; and that's just about the extent of what was said.

He said nothing was said to him about his production at that time. Plant Superintendent John Scoggan testified that Mack was unable to get the production requirement, that his learning was not improving, and that was why he was terminated. He acknowledged on cross-examination that his discharge of Mack was after he had learned about the union drive. He also acknowledged that while Mack was employed Respondent had a water manifold problem where Mack worked which affected his production to some extent. Foreman Ashley testified that Mack's production and attendance were poor while Mack was a probationary employee, and he was terminated for those reasons.

David E. Henline was first employed by Respondent from August 14, 1978, until early November 1978. He did not have 90 days when he was called into the office and informed by Scoggan that they had to get rid of one man, and he was that man. Scoggan also told him he was not quite qualified. Nevertheless Henline was recalled by the Respondent on December 4, 1978, when he was assigned to clean machines, and later assigned to operation 60. He said he attended a meeting at which the employees discussed the Union in January 1979. He signed a union card on the plant's parking lot. He also attended a meeting on January 20 where he received a union penholder and literature. He placed the union literature on a table in the plant's canteen and later saw Foreman Bill Carpenter pick up the literature. He wore his union penholder to work the day after January 20.

Henline further testified that the following occurred on February 8, 1979:

> A. Jim Betts and Mr. Scoggan went into the office. I seen those two. I was running in operation 30 and I could look right through the window and see them.
>
> Q. How long were they in the office?
>
> A. They were in there approximately 35 minutes.
>
> Q. All right. What happened?
>
> A. During this time, Steve Cornelius was walking by my machine and I called him over and I said, "why don't we just have a talk with them and tell them to get off our backs because we were doing our job."
>
> And during this time, Bill Carpenter came up and started hollering. Well, he didn't holler, he started talking to Steve Cornelius and he said that he was bothering me, to go on back to the machine.
>
> Q. And what did you say?

A. I told him to wait a second and he didn't bother me. And Steve Cornelius said, "Let's go in to the office."

Q. At that time, who went into the office?

A. Bill Carpenter, Steve Cornelius, and myself.

Q. Tell us as carefully as you can what each person said.

A. There was talk as far as Bill Carpenter coming up and talking to Steve Cornelius as far as bothering me. . . .

And after that, Bill Carpenter looked at me and said, "How come you are staring at me. Are you trying to intimidate me or whatever?"

And I said, "Well, everytime I turn around you are standing right there watching me. . . ."

Okay. And at this time, Mr. Scoggan says, "Well, I don't think we are coming to any kind of agreement."

And I asked him then, I said, "Can we agree on one thing, that you will start leaving people alone as far as this union business. We do have the right to organize."

And he looked at me and he grabbed a paper and he says, *"Well, I don't believe you've got your 90 days in, and that you have a right to push this union."*

He said, "You're still probationary help."

On the next day February 9, Henline said he reported to work a few minutes late, got a cup of coffee, and went to his machine on operation 60. Foreman Bill Carpenter came to him and told him he had to cut back a man on the right angle line and he was transferring him 4-hours on operation 60 and 4 hours on operation 30. After lunch he went to work on operation 30 and, after working a while, Foreman Bill Carpenter came to him, shut off his machine, and told him he wanted to see him in the office. He asked for a witness but Carpenter refused, and he accompanied Carpenter to the office of Scoggan, who told him he had to let him go. He asked why and Scoggan said, absenteeism and you are not qualified.

Henline admitted he had been previously warned one time for running bad parts. After that warning, he said his work improved and he missed only one day which was January 16, when he had a strep throat for which he brought a doctor's certificate. Henline said he also checked his parts, 1 out of every 10 as he was advised by Bill Carpenter. On operation 30, he said there is one hole which you have to check and make sure it was not edge sharp. He checked every part. On cross-examination, however, Henline admitted he was absent 36-3/4 hours during the month of January and received a verbal warning about excessive absenteeism. He further stated that Respondent's policy is that, if you are laid off and rehired, you return as a probationary employee. While at work however, employees go to the coffee and pop machines at any time and Respondent had not issued any restrictions on them doing so.

Foreman *Wilbur Carpenter* testified that in early February he caught Henline talking to fellow employee Cornelius at the latter's machine. He asked Henline to stop talking because he had observed him talking on several occasions prior thereto. Steve Cornelius said, "Fuck it, let's go in the office." They went to the office and Foreman Carpenter reported the incident to Scoggan. Henline stated that he felt Carpenter was harassing him, but he acknowledged that he was talking to other operators, and Scoggan advised him that the Company could not tolerate such talking. Henline agreed that he would not talk and they returned to work.

With respect to the events leading up to the termination of Henline, Foreman Carpenter further testified as follows:

A. Dave came back to work after lay off. We recalled him on, I believe it was, December the 4th, he came back to work. Two days later, he was off work for some reason and this continued. It seemed that I could not get a 40-hour week out of Mr. Henline. On January 30th, Henline came into work three and a half hours late. He did not call me, to inform me that he was going to be late. He just, you know, come in whenever he felt like it and I have to shut another job down to replace his position on that line. He came in and I asked him why he was late. And he said, "Well, I won't lie to 'ya.'" He said, "I went out and got drunk last night and just didn't get up."

So, I informed him that I would no longer tolerate his absenteeism and that, since the month of January, he had missed 37 and 3 quarter hours in one month alone. He said, *"Well, Bill, I know it looks bad, but it won't happen again."* I said, "Okay. Now, you do realize that you are probationary." And he said, "Yeah, I understand that." So, then, I believe it was on the 7th of February, he came up and he says, "Bill, I've got to have the afternoon off." I asked him for what reason, and he said he had to go to see a lawyer or go to court or something like that. There was a lawyer involved.

And I said, "Well Dave, we just discussed this last week. But if you have to go, I will let you off this time. But, I cannot tolerate any more of this."So then, the next day he was involved in this incident with Steve Cornelius, and then the following day I believe was the 9th of February he came into work approximately 1/2 hour late. He did not call me and tell me that he was going to be late. He came in and I was standing at the desk and he walked right past me. He went over and punched in. He went over and got himself a cup of coffee. He walked over to his machine area, turned his machine on, and just stood there and drank his coffee and stared at me.

Scoggan approached him (Carpenter) and asked why was Dave Henline late. Since he had not inquired as to the reason for Henline's tardiness he approached Henline and asked him why was he late. Henline replied, *"Oh, I overslept."* Thereupon, Foreman Carpenter collaberated with Scoggan and they decided and did in fact terminate Henline for poor attendance on that same day, February 9.

Charles (Charlie) Johnson testified that during the week of February 9, after Kim Mack, Dave Henline, and Pat Grush were discharged, he asked Scoggan why did he fire Kim, David, and Pat, and the other employees he fired the day before. Scoggan replied, "I don't see why that is any of your business." Johnson said he laid some papers down on Scoggan's desk at that time and Scoggan looked up at him and said, "*I told you I'd fight fire with fire.*" *Scoggan then asked him to have most of the fellows take off their union badges (penholders), particularly those guys who have less than 90 days because they will not be here.* Johnson said he then approached his fellow workers and told everybody to take off the penholders (G.C. Exh. 9). The probationary employees took off their penholders.

On March 9, while running his machine around 8:50 a.m., Johnson said he took a part of his end mill machine and went over to the work station of Doug Stephens on the conveyors. He asked Stephens if he had a dollar he could borrow until he could get change for a $20 bill. Stephens reached in his pocket and Foreman Robert Ashley walked up and said something and turned around as though he was going to write up someone, so he (Johnson) said, "I want a copy of it because Ashley knew union activity was going on." Ashley told Johnson to accompany him to Scoggan's office. Foreman Ashley then told Scoggan that Johnson had threatened him. Johnson denied he threatened Ashley and told Scoggan he had a witness. Scoggan asked who was the witness and Johnson said, Douglas Stephens. *Scoggan said there was no use in bothering him because "he's a union guy."* Scoggan then told Johnson he was going to take his foreman's word and suspended Johnson for 3 days, telling him it would be left up to the members of the personnel department whether or not he could return to work at Respondent. Johnson said he looked over at Ashley and said, "If I said anything to offend you, I'm terribly sorry." Scoggan told him to call in on Tuesday and he would tell him whether or not to return to work.

Johnson said he served as an observer for the Union in the April election. He continued to testify as follows:

> Q. What happened after the election if anything?
>
> A. Well, after the election was over with, Mr. Pinkerton and Mr. Goff and I think it's Mr. Peterson, they come into the crib where we held the Union election and was there for the counting of votes; and the girl from the Labor Board took all of the votes out of the box, laid them on the table, and opened the box up; and she said, "You can see there's nothing else in the box."
>
> And she folded it up and I counted the "no" votes and the company representative counted the "yes" votes; and we had five votes that were challenged.
>
> The girl says, "These five votes will be opened up in Indianapolis, and they will make the decision at the Labor Board which way they have been challenged."
>
> JUDGE GADSDEN: The girl, now, is that the representative of the National Labor Relations Board?
>
> A. Yes, sir. . . .
>
> Q. Did you hear anything? What was it again?
>
> A. I hear Mr. Pinkerton ask Mr. Peterson what he was going to do now that they had lost the election, and Mr. Peterson says, "We haven't lost it yet. I can file petitions and have it tied up for a year and have another election. We can get it thrown out."

Johnson had an accident on the job during which time he fractured his jaw knocking two teeth loose and tearing one bottom tooth from its roots. He left the factory and went to his personal dentist for extractions. Sometime thereafter, Plant Manager Goff told him to get busy on those teeth for insurance purposes, and Johnson said he thereupon secured an appointment with Dr. Parnell for Friday, April 20, 1979, before he was terminated. He said he reported for the appointment but the dentist was not there so he made an appointment for the following Monday. He testified that he went on Monday for 1 hour and was told to come back on Tuesday morning, when he had the extraction. However, he said he received a telegram from Respondent advising that he was terminated.

Johnson said he knew he would not be going to work on Monday if he had an extraction and that he failed to call in on a previous occasion in 1978 and was not disciplined therefor. He said no one ever told him if he failed to call in again he would be fired. Nor was he told that if he violated any company rules he would be terminated when he received his 3-day suspension. The telegram from Respondent said he (Johnson) was terminated for being AWOL. Thereafter, Johnson acknowledged he had received a verbal warning on April 19, 1978, for failing to call in. Ashley denied that Johnson told him he would be off on Monday or on any day during the week of April 16.

Fellow employee Douglas Stephens corroborated Johnson's earlier testimony that he did not tell Bob Ashley that he would like to take him outside to fight him. Instead, when Bob Ashley told them that he did not want them talking or he would write them up, Johnson said, "Bob Ashley, are you threatening me?"

Albert L. McMaken, personnel and purchasing agent for Respondent, testified that on Monday, April 23, Johnson's failure to report for work generated inquiries from Scoggan, causing him to check Johnson's record. When he found that Johnson had not called in and had a history of absenteeism, tardiness, and failure to call in, he, Scoggan, and Bill Goff decided, after consulting with Labor Consultant Peterson, to terminate Johnson for excessive absenteeism, failure to call in, and AWOL. Since the policy is to call in within the first 2 hours from the start of the shift, Johnson was in violation of company policy.

Foreman *Robert Lee Ashley* testified that, around March 8 or 9 after observing Doug Stephens and Johnson engaged in considerable conversations, he told Johnson to go to his machine and Johnson got red in the face, and said angrily, "If you write me up, I will file a grievance." He told Johnson he was not going to write him up and to go back to his machine. Johnson said, "This is not a threat, this is a promise. If I meet you outside the Company property . . ." and he stopped. Ashley said he

then told Johnson to come with him to the office where Johnson denied he threatened Ashley. Finally Johnson admitted to threatening him and apologized to him. Scoggan told Johnson he thought a lot of him for owning up to what he did but told him he had to suspend him for 3 days for threatening the foreman. Johnson accepted the suspension and left the plant.

Foreman Ashley testified that he first saw consultant Floyd Peterson in early February 1979 in a meeting after management learned about the petition. However, it is particularly noted that the specific date of Peterson's entry into the labor matter in the plant is not specified nor reasonably estimated by Respondent.

Plant Superintendent *John Scoggan* further testified that in February he told shop committeemen Charles Johnson and Vance Battershell that, 5 days ago, Respondent had received a petition from the National Labor Relations Board or the Union for an election, and he was going to terminate the shop committee temporarily. He requested them to turn in their binders with which they used in negotiating with Respondent. He thanked them for their services in processing the grievances with management. *He denied he told them that most people in the shop felt they did not need a union, and that he did not ask them if they supported the Union or to tell any employees to remove the union badges.*

Plant Superintendent Scoggan denied that he told Doug Stephens that he and Charlie Johnson were trying to organize a union at the plant, or that Randy Hively so informed him.

With respect to *Charlie Newton*, Scoggan denied that he asked Newton did he think he was crazy, that he would hire his wife so she could vote union. Nor did he say anything to him about wearing a union penholder.

With respect to conversations held with *Joel Dossen*, Foreman Wilbur Carpenter testified that, in mid-March, Dossen called him over to his machine to repair it and while he was doing so Dossen told him he went to a union meeting over the weekend because he wanted to learn what was going on, that Pat Grush was there, and that he did not understand why Grush was there and why he tried to destroy Bob Ashley. Dossen on other occasions would ask him what he thought about the unionization. He said the only question he has ever asked Dossen was, "Did he have any doubts in his mind, that this Union would be any different from any other union." He denied he asked Dossen any other questions. *On cross-examination, however, he admitted he asked employee Charlie Austin if he were going to attend the union meeting. He also admitted he waited around the table to see who was going to pick up the union literature.* He further acknowledged that, in February, he saw Newton pick up union literature in the lunchroom, take it over to his station, and put it in his toolbox.

Carpenter also testified that, in early January, Stephens and Johnson called him to their work stations about a problem, and when he left Johnson yelled, "This Company needs a union."

With respect to conversations with employee Brad Harris, President Pinkerton testified that he received a profits-and-loss statement on the Company's operation at the beginning of the fiscal year, October 1. He said that, since January 1979, business has been severly poor and he thought Respondent should cut its overhead, including personnel. In late January or early February he acknowledged he initiated a conversation with Brad Harris because he had heard Harris was not satisfied with his wages. He told Harris he was still a trainee, still young, and if he remained in the job he would acquire a lifetime trade and continue to earn money. He told Harris not to be so impatient. He continued his conversation with Harris as follows:

> "And I said, in fact, you know, I am a little dispondent now because of what has happened, referring to this petition." I said, "I thought I was really doing something good for you people." I said, "I have given all the benefits that I could possibly afford, I've got the best insurance policy we can come up with, you know, every year we are giving and giving and giving and we have the shop committee, we have the appeals system set up. I am always walking through the shop every day, but I make myself available for anyone who has a question." And I said, "Still people go outside and think that they have to go outside for help." You know, "Some days, I get to feeling like I am some kind of a Son-of-a-Bitch."

Pinkerton denied he asked Harris how he felt about the Union or told him that he would refuse to bargain with the Union, or that he did not have to give the employees anything. He denied he asked any of the above questions or made any of the above statements to employee James Zorger. He denied that he asked any employees about their union activities or interests.

The credited evidence of record further established the following facts:

1. Foreman Bill Carpenter acknowledged on the record that during his telephone conversation with employee Charlie Austin in January, he asked Charlie Austin was he going to the union meeting.

2. In late January, Foreman Robert Ashley asked employee Joel Dossen had he heard anything about the Union. Subsequently, Ashley and Dossen discussed their prior union experiences, as well as which employees (by name) they thought were for or against the Union.

3. In late January or early February, Foreman Bill Carpenter asked Dossen if anything was said about him (Carpenter) at the union meeting. He also asked how many employees were present there, and on two occasions asked whether employees David Henline, Pat Grush or Kim Mack were there.

4. In early February, Foreman Miller undisputedly asked employee James Zorger how he stood on the union matter.

I conclude and find that the above questions (1) by managerial persons of Respondent constituted coercive interrogation of the said employees about their union interest, desires, or activities, in violation of Section 8(a)(1) of the Act. The above conduct of Respondent is unlawful because the interrogation was carried on by high ranking managerial officials of Respondent, and because the employees were not given any assuredness that they

would not be subjected to acts of reprisal by Respondent for supporting the Union.

5. After a conversation about the Union between Charlie Johnson and Plant Superintendent John Scoggan, Mr. Scoggan told Johnson "we will fight fire with fire," that his (Johnson) brother-in-law (Roger Boggs) on the second work shift was engaged in union activity, and Scoggan directed Johnson to have his brother-in-law and fellow employees (especially probationary employees with less than 90 days tenure) to remove or take off their union penholders which they were wearing.

6. On January 25, employee Patric Grush directed Grush to remove or take off the penholder he was wearing.

7. In January or February, Foreman Carpenter told employee Charles Newton to get rid of that union literature and directed him to refrain from distributing union literature on company property.

8. In late February, Plant Superintendent John Scoggan told employee Charles Newton that someone said he (Newton) liked working for Respondent, but he (Newton) was still wearing those union badges.

The above-described utterances by managerial personnel of Respondent was of a threatening and restraining character, and as such had a coercive effect upon the employees exercise of Section 7 protected rights, and therefore violated Section 8(a)(1) of the Act.

9. In early January, Plant Superintendent Scoggan directed Foreman Francis Miller to listen out for employees' union activity in the plant, and, in January or early February, Plant Superintendent Scoggan told employee Douglas Stephens that he had heard through the grapevine that he (Stephens), Charles Johnson and Randy Hively were trying to organize a union.

I conclude and find upon the foregoing credited evidence that such conduct by Respondent led the employees to believe or feel that their organizing activities were under surveillance by Respondent. Since such conduct had, or would have a restraining and coercive effect upon the employees Section 7 rights, it was therefore in violation of Section 8(a)(1) of the Act.

10. In March, Respondent's President Dwight Pinkerton solicited grievances of the employees during a company meeting by telling the employees in a company meeting during the organizing campaign, that he did not want them to feel that they needed a union; that if they had a problem he wanted them to come to him.

The company-called meetings in March and April were not usual meetings, but, rather, were held during the peak of the employees' organizing campaign with the design to frustrate the employees' efforts to organize. Such conduct by Respondent had a coercive and a restraining effect upon the employees Section 7 rights, in violation of Section 8(a)(1) of the Act.

11. In early February, President Pinkerton told employee Brad Harris, whose testimony I credit, that he (Pinkerton) did not care for unions at all, and that if Harris wanted a union he (Harris) was calling him (Pinkerton) a "Son-of-a-Bitch;" that he (Pinkerton) hated unions; and that if the employees selected the union, the union could only make him sit down and talk but he did not have to give anything.

12. In January, and again in a company meeting, President Pinkerton told employees James Zorger, and other employees, respectively, that he (Pinkerton) could do as much for the employees without a union as he could with a union.

I conclude and find upon the foregoing evidence that such conduct by Respondent had a threatening and coercive effect upon the exercise of employees' Section 7 rights, in violation of Section 8(a)(1) of the Act. Said conduct also constituted evidence of Respondent's animus towards the union activities of its employees.

Additionally, and in view of the foregoing unfair labor practices committed by Respondent, I must now consider and determine whether such conduct was related to, or in any way served as a motive for, various actions and nonactions by Respondent on February 9 and thereafter. In this regard, the credited evidence of record established that the Union's petition for certification was filed on February 2, 1979, and, 7 days later, Respondent discharged employees Kim Mack, David Henline, and Patric Grush on February 9, 1979. All three employees were still within the 90-day probationary period at the time of their discharge. Nevertheless, the record shows that this is the first time Respondent has ever discharged more than one employee on any given day.

Employee Kim Mack was recently reemployed by Respondent. He reported to work an hour late on February 9, and proceeded to drink a cup of coffee at his machine. He was immediately summoned to the office of Plant Superintendent John Scoggan who advised him that it was felt he did not enjoy this type of work and was therefore being terminated. Although no other reason was given for his discharge at that time, Scoggan testified that Mack was terminated for poor production and slow learning, and that the discharge took place before he learned about the employees organizing activities. However, on cross-examination, Scoggan acknowledged that Mack's discharge occurred after he learned about the employees' union activities. He further acknowledged that Mack's production was affected to some extent by a water manifold problem with the operation on which Mack worked. By reversing and clarifying his testimony given on direct examination, Scoggan confirmed my observations of his demeanor on the stand, that he was not testifying truthfully with respect to his real reasons for discharging Mack.

Moreover, I find it rather difficult to believe Scoggan rehired Mack whom he contends was such a slow performer. Nevertheless, even if Respondent's reasons, in view of these circumstances, were accepted at face value, they again run into question when it is observed that Mack was among two other probationary employees (Grush and Henline) also terminated on the same day (February 9), only a few days following Respondent's receipt of the Union's petition.

Employee Patric Grush was rehired by Respondent and reported to work after a month's layoff on January 9. Shortly thereafter, as he walked past President Pinkerton, the latter asked him how he liked his job and how was he getting alone. Grush replied. "Fine." As he started to go to work, he was summoned to the office by

Foreman Bob Ashley where Plant Superintendent John Scoggan negatively asked, "You don't have 90 days do you?" and when Grush replied,"[No], Scoggan advised him that it was with deepest regrets to terminate him, but he had to let him go. Scoggan then asked Grush did he have anything to do with the Union.[4]

However, at the hearing Scoggan testified that Respondent terminated Grush for poor quality and quantity production, that Grush had neglected to check parts with a gauge as the job required, and that he had been warned about the same. On cross-examination, Scoggan acknowledged that the incident regarding Grush's failure to check his parts with the gauge occurred on January 30, and that Respondent did not discharge Grush at that time. The fact that Respondent did not discharge Grush at that time clearly infers that Respondent did not intend to terminate him, but rather to give him a chance to comply with the check-parts requirement. Consequently, since Respondent had cause to terminate Grush on January 30 and did not do so, it's contention that it decided to discharge him on February 9 for the same reason (failure to check parts), only 6 or 7 days after Respondent's receipt of the Union's petition, clearly infers that Grush's production and failure to check parts was a pretext advanced by Respondent to justify its discharge of him.

Employee David Henline first worked for Respondent for less than 90 days between August and November 1978, when he was terminated allegedly because he was not qualified and because Respondent had to let one man go. Henline was rehired by Respondent and reported to work on December 4, 1978. He signed a union card in January and wore a union penholder and placed some union literature on the table in the plant's canteen on January 21. Subsequently, during a conference about a disagreement involving Foreman Carpenter, Steve Cornelius, and David Henline, in Scoggan's office, Henline asked Scoggan could management leave the employees alone (stop harassing them) as far as union business was concerned, because he said, the employees do have the right to organize. I credit Henline's testimony that Scoggan replied, "Well, I don't believe you have your 90 days in, and that you have the right to push the union . . . . You're still probationary help."[5]

When Henline reported to work the next day (February 9) 30 minutes late and proceeded to have a cup of coffee before working, he was immediately taken to the office by Foreman Carpenter and advised by Scoggan that he was terminated for absenteeism and lack of qualifications. The record shows that Henline was absent 36-3/4 hours during the month of January and that he was late 3-1/2 hours on January 30, at which time Respondent told Henline it would not tolerate his continued absenteeism. The record does not show that Henline was specifically warned about being late. Henline acknowledged that he was warned on one occasion for running bad parts, but said thereafter his parts improved.

The evidence is quite clear that Respondent had grounds to terminate Henline in January for absenteeism but neglected to do so. While it is also clear that Respondent warned Henline for running bad parts sometime in January, it is undisputed and equally clear that Henline was rehired by Respondent in December 1978, and showed improvement in his work performance with respect to parts. Thus, Respondent might have had grounds to terminate Henline for performance at that time it warned him about the bad parts, but it did not do so. Moreover, since it is not shown that Henline ran additional bad parts after the warning or that he was absent without leave after the warning on January 30, the record does not show that he was discharged for being absent or for running more bad parts about which he had been previously warned. Consequently, the only current infraction of a work rule committed by Henline on February 9 was his reporting to work 30 minutes late.

It may be questionably argued that Respondent had just cause for terminating Henline on February 9 for being tardy. However, this argument falls into greater question when Respondent's discharge of Henline is reviewed in conjunction with its statements to Henline on February 8 about his union activity, the previously found unfair labor practices committed by Respondent during the months of January and February, the failure of Respondent to comply with its disciplinary procedure in issuing an oral warning, written warning, suspension, and involuntary termination, and Respondent's precipituous and first multiple discharge of three employees (Pat Grush, Kim Mack, and David Henline, all probationary employees) on one day (February 9).

It is particularly noted that Respondent commenced articulating that Henline was not qualified after it hired Henline for the second time, and only after its receipt of the Union's petition on February 2, and its discussion with him about his union activities on February 8. Under the aforedescribed combined circumstances, I am persuaded that Respondnt's discharge of Henline on February 9 was substantially, if not totally, motivated by his activities on behalf of the Union.

Finally, when Respondent's recent (January and February) history of unfair labor practices and union animus, as found herein, are considered along with the timing, lack of ultimate warning given the discharges, and the precipitous character of the discharges of Mack, Grush, and Henline, it becomes unequivocally clear that their discharges were predicated upon a discriminatory motive, and, as such, were in violation of Section 8(a)(3) and (1) of the Act. *Haynes Industries, Inc.*, 232 NLRB 1092 (1977).

After a verbal exchange between employee Charlie Johnson and Foreman Bob Ashley on March 9, Plant Superintendent Scoggan, in resolving the controversy, denied Johnson's request for Douglas Stephens as a witness, saying "there was no use to bother him because

[4] Although Scoggan denied he asked Grush anything about the Union, I do not credit his denial. Instead, I credit Grush's testimony to that effect, not only because I was persuaded by Grush and Scoggan's demeanor, respectively, but because the evidence of record as a whole suggests that Scoggan was trying to make a subtle impression upon Grush and other employees, who learned about Grush's discharge, that Grush was probably discharged for engaging in union activity.

[5] I do not credit Scoggan's denial that he made the latter statements not only because I was not persuaded by his demeanor that he was not telling the truth, but also because said denial is inconsistent with Scoggan's subsequent termination of Henline, as well as with the tenor and logical consistency of the evidence of record as a whole.

he's a union guy." After some discussion, Scoggan told Johnson he would take the word of his foreman (Ashley) that Johnson had threatened Ashley and thereupon suspended Johnson for 3 days. Prior to the above-described incident, on February 9, Johnson asked Scoggan why he discharged David Henline and Pat Grush, and Scoggan said that he did not see why that was any of his (Johnson's) business. Going about the business for which he entered Scoggan's office, Johnson laid some papers down on Scoggan's desk. Scoggan looked up and said, "I told you I'd fight fire with fire," and he asked Johnson to have the fellows take off their union penholders.

In addition to having contact with the Union in December 1978, Johnson signed a union card in January and distributed union literature on the plant's parking lot after January 20, 1979. He also served as an observer for the Union in the April election.

In an effort to justify its termination of Johnson, Respondent adduced evidence from Johnson's personnel record. In response to some of the information in his personnel record, Johnson acknowledged that he received a verbal warning on April 19, 1978, for failing to call in. After being suspended for 3 days on March 9, 1979, Johnson failed to report for work on Friday, April 20, 1979. He was pronounced AWOL by management a few minutes after 9 o'clock on April 20. Johnson contended that he went to the dentist on April 20, but I am not persuaded by the evidence that he did or did not in fact visit the dentist on Friday. In any event, the evidence is clear that Respondent terminated Johnson by telegram.

In determining whether Respondent's suspension of March 9 and its later discharge of Johnson on April 23 were in any way motivated by Johnson's union activity, it is first observed, as herein before found, that Respondent had knowledge of Johnson's significant involvement in the employees' organizing drive. Secondly, not only did Johnson serve as an observer for the Union in the April election, but it is noted that, when Johnson asked that Doug Stephens bear witness to the altercation between himself and Foreman Ashley on March 9, Scoggan said there was no use since Stephens was a union guy (possibly inferring union supporters are apt to support one another). Thirdly, in discussing whether or not Johnson threatened Ashley on March 9, Scoggan ignored Johnson's denial of the charge and announced that he would take Ashley's word without further investigation. He then suspended Johnson for 3 days.

It was established in this proceeding through the admission of Foreman Bob Ashley, that the essence of the contended threat against him by Johnson, was that Johnson said something to the effect of "meet you off company property." However, the record shows that Respondent was not interested in ascertaining the factual substance of the contended threat on March 9, and Johnson accepted the suspension. It is also noted that Respondent again did not follow its graduated ladder of severity in imposing disciplinary action against Johnson because it did not establish that it had issued a verbal warning on the first offense, and a written warning on the second offense, prior to Johnson's suspension on March 9. Consequently, the evidence is more than ample to infer the conclusion and finding that Respondent's suspension of Johnson was motivated by Johnson's union activities.

Additionally, when Johnson failed to timely (7 a.m.) report to work on Friday, April 20, Respondent concluded 2 hours after the start of the shift (9 a.m.) that Johnson was AWOL and decided to terminate him. Respondent consulted with its labor relations consultant, called Johnson by telephone and advised him that he was terminated, and thereafter transmitted its decision of termination to Johnson by telegram. Johnson received a telephone call from Western Union at 10 a.m. on April 20, advising him of the contents of the telegram.

Thus, it is readily apparent that while it was well established that Johnson was late at 9 a.m. on Friday, April 20, there was no way Respondent could have reasonably and fairly concluded a few minutes after 9 a.m. that Johnson was going to be AWOL for the entire day. Hence, the premature determination of AWOL for the day, before Johnson had a factual chance to be AWOL, further reveals the discriminatory anxiety of Respondent to terminate Johnson even before he was in fact AWOL for the day. When the same factual considerations outlined in evaluating Respondent's discriminatory suspension of Johnson are inserted into the chain of events which occurred in the plant between January and April 20, the continuity of Respondent's union animus and discriminatory conduct is logically connected to its discriminatory discharge of Johnson on April 20. This conclusion is inevitable because Respondent's discharge of its longtime (since 1976) employee Johnson was motivated by Johnson's active involvement in the Union, of which fact Respondent was fully aware. The discharge was therefore violative of Section 8(a)(3) and (1) of the Act.

Respondent's efforts to establish cause for its discharge of Johnson is clearly a pretext to conceal the unlawfulness of the discharge.

Although Respondent tried to show that it had professional advice and knowledge with respect to its compliance with the National Labor Relations Act, as amended, it is especially observed that Respondent contends it first retained labor managment consultation (Blackstone, Simmons, and Peterson) in early February, notwithstanding its flagrant violations of the Act during January through February 9. The record shows that Respondent failed to designate or reasonably estimate the specific date in February on which it retained consultative services, which would appear to be an easy matter of proof for Respondent. Consequently, I find that Respondent did not retain labor management consultative services until after February 9. If Respondent did in fact retain such services prior to February 9, then I further conclude and find that Respondent did not comply with any correct advice which might have been given by such consultative services. In fact, the great though successful effort to skillfully discharge Charlie Johnson on April 20 clearly infers that Respondent was trying to achieve its objective (discharge of Johnson) within the scope of the law, after it may have had the benefit of consultative advise. From Respondent's point of view, unfortunately it failed in that effort.

Respondent's Denial of Raises to James Zorger and Brad Harris

Respondent acknowledged that trainee employees receive a raise in wages within 3 to 6 months. Employee trainee James Zorger was undeniably promised a raise after 90 days by Respondent. When trainee Brad Harris took his current position he understood the normal time to receive a raise was between 60 and 90 days. Respondent stipulated that it denied Zorger a raise and the record shows that Respondent told Zorger he could not have a raise because the Union filed a petition with the National Labor Relations Board. In any event, after 10 months in their current positions, neither Zorger nor Harris has received a raise.

In February, Brad Harris told Respondent's president, Dwight Pinkerton, that he felt he deserved a raise and Pinkerton asked Harris how he felt about unions. Harris said he did not want to talk about it. Pinkerton then told Harris that if he wanted a union in the plant it was like calling him (Pinkerton) "a Son-of-a-Bitch"; and that he hated unions.[6] Also in February, Foreman Francis Miller asked Harris how he stood on this union matter. Respondent did not offer any explanation to Harris why it denied him a raise but the record evidence clearly shows that Respondent suspected and/or knew of both Zorger's and Harris' involvement in union activities.

Thus, keeping in mind the voluminous evidence of Respondent's union animus and unfair labor practices herein found, I further conclude and find upon the foregoing evidence that both Harris and Zorger were denied raises by Respondent because of their and other employees' activities on behalf of the Union. Respondent's denial of the raises under such circumstances were clearly discriminatory and violative of Section 8(a)(3) and (1) of the Act. This conclusion is especially true when its also borne in mind that Respondent unequivocally stated that it denied a raise to Zorger because of the Union's petition filed with the National Labor Relations Board. In other words, Respondent suggested that it was refusing or failing to grant further raises pending the outcome of the election. Such a reason for denying a raise is clearly unlawful as articulated by the Board in *The Gates Rubber Company*, 182 NLRB 95 (1970). Here, Respondent did not tell Harris and Zorger that its wage policy would be adhered to regardless of the outcome of the union election.

Respondent's Suspension of James Zorger

The record further shows that Respondent suspended employee James Zorger in July for 3 days allegedly for running bad parts. Zorger acknowledged that he ran bad parts on several occasions and Plant Superintendent John Scoggan testified that other employees had been suspended for poor quality of work. However, Scoggan acknowledged on cross-examination that James Zorger was the first employee suspended for running bad parts. Zorger corroborated Scoggan's testimony by adding that fellow employees Mike Flesher, Charlie Austin, and Foy Phelphs have also ran bad parts on occasions and Respondent did not impose any disciplinary action against them. Zorger's testimony was not disputed in this regard.

Consequently, I conclude and find upon the foregoing credited evidence that Respondent has not previously suspended employees for running bad parts; that Respondent does not have a disciplinary rule which requires it to suspend employees for running bad parts, but even if it does Respondent does not enforce the rule uniformly; that the record shows that James Zorger participated in union activities in the plant and discussed the Union with Respondent's president, Pinkerton; that Zorger was asked by Foreman Francis Miller how he stood on the union matter; that Respondent had knowledge of Zorger's and other employees organizing activities and had discussed those activities with Zorger; and that Zorger was singled out for suspension by Respondent as a result of Respondent's manifested union animus and the organizing activities of Zorger and employees in an effort to discourage employees from supporting the Union. Under these circumstances, Respondent's suspension of Zorger was discriminatory and in violation of Section 8(a)(3) and (1) of the Act.

The record also shows that, in January or early February, Scoggan told Douglas Stephens that he (Scoggan) had heard through the grapevine that he (Stephens), Charlie Johnson, and Randy Hively were trying to organize a union. Stephens replied, "[N]o." A few days later, while working as an inspector on the day shift, Scoggan told him he was needed on the night shift, and that it was either the night shift or no work. Although 2 weeks later Stephens was transferred back on the day shift as an operator, he did not want to work the night shift.

Since the timing of Stephens' transfer to the night shift was immediately subsequent to Respondent's (Scoggan) unlawful interrogation of Stephens, and its antiunion conversations, it is reasonably established that Respondent's transfer of Stephens was motivated by his and other employees' union activity. The evidence shows that Respondent surmised and in fact had knowledge that Stephens was involved in the organizing activities, and transferred him to discourage him and other employees from joining or supporting the Union. This conclusion is especially true when the evidence of record is viewed as a whole. Respondent's discriminatory transfer of Stephens was therefore a restraint on employees' Section 7 rights, in violation of Section 8(a)(3) and (1) of the Act.

Although Respondent discontinued its mass issuance of cotton gloves to all employees, it nevertheless continued to issue such gloves to employees operating machines or handling materials which were hot, extremely rough, or injurious to the skin. Respondent also offered undisputed testimonial evidence that the employees were wasteful with their use of the gloves. That is, that it found unfully worn gloves in the trash and other places of abandon, that the cost of such gloves were constantly increasing, and that, according to its inventory and the rising cost of

[6] Although President Pinkerton denied Harris' version of their discussion, I nevertheless credit Harris' account over Pinkerton's because I was persuaded by the almost overwhelming consistency of the evidence that Harris was telling the truth. I received the distinct impression from the demeanor of Pinkerton that he was favoring Respondent in testifying on this subject.

such gloves, it implemented a more economical policy for the issuance of such gloves.

I credit the foregoing undisputed evidence of Respondent and find that its explanation for modifying its policy (regarding the issuance of gloves) was reasonable. I further conclude and find that the glove policy change was not discriminatory and violative of Section 8(a)(3) and (1) of the Act.

The allegation that Respondent discriminated against its employees with respect to the issuance of gloves is therefore dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce. They are unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

V. THE REMEDY

Having found that Respondent is engaged in unfair labor practiccs warranting a remedial order, I shall recommend that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent interfered with, restrained, and coerced its employees in the exercise of their Section 7 protected rights, in violation of Section 8(a)(1) of the Act by coercive interrogation of its employees about their union interest and activities, by creating the impression that the organizing activities of its employees were under surveillance by Respondent, by giving employees the impression that efforts to organize the Union would be futile, by soliciting employee grievances for the purpose of causing them to reject the Union as their collective-bargaining representative, and by threatening employees by telling them Respondent would fight the Union with fire and ordering them to abandon their union literature, refrain from distributing it on company property and to take off their union penholders, the recommended Order will prove that Respondent cease and desist from engaging in such unlawful conduct.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from, in any manner whatever, interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. *N.L.R.B* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

CONCLUSIONS OF LAW

1. Respondent, American Tool and Engineering Co., Inc., is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. Shopman's Local Union No. 726, of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, is and has been at all times material herein, a labor organization within the meaning of the Act.

3. By coercively interrogating its employees on various dates during January and early February 1979, about their and other employees union interest or activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

4. By giving the employees the impression that their activities for or on behalf of the Union were under surveillance by Respondent, Respondent violated Section 8(a)(1) of the Act.

5. By soliciting employees' grievances concerning their interest and/or activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

6. By threatening employees in telling them it will fight the Union with fire and ordering them to take off their union penholders and to abandon and refrain from distributing union literature on company property, Respondent violated Section 8(a)(1) of the Act.

7. By giving the employees the impression that their efforts to organize the Union would be futile, Respondent violated Section 8(a)(1) of the Act.

8. By discriminatorily assigning employees to more onerous and inconvenient duties or work shifts because they engaged in concerted or union activities, in Respondent violated Section 8(a)(1) of the Act.

9. By discriminatorily suspending or terminating the employment of employees because they engaged in concerted or union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

10. By discriminatorily failing and refusing to grant wage increases to employees because they engage in concerted or union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

11. By discriminatorily assigning employees to more onerous or inconvenient duties or work shifts, Respondent violated Section 8(a)(1) of the Act.

12. By promulgating and maintaining an overly broad no-solicitation/no-distribution rule, Respondent violated Section 8(a)(1) of the Act.

13. The aforesaid unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]